Supreme Court, U.S.
FILED
JUN 11 1993
OFFICE OF THE CLERK

No. 92-1819

In The

Supreme Court of the United States

October Term, 1992

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,
Petitioners,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES OF WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D. and HARVEY L. NEIMAN, M.D.,
Respondents.

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,
Petitioners,

vs.

WYNNE COOPER, M.D.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENTS WESTERN PENNSYLVANIA HOSPITAL AND NEAL B. SIMMONS, M.D.

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QUESTIONS PRESENTED

I. WHETHER CERTIORARI IS PROPER GIVEN THE ABSENCE OF ANY CONFLICT AS REQUIRED BY RULE 10.1(a) OF THE RULES OF THE UNITED STATES SUPREME COURT OR FOR ANY OTHER REASON.

Answer: No.

II. WHETHER PENNSYLVANIA'S WRONGFUL BIRTH STATUTE SET FORTH IN 42 Pa. C.S.A. § 8305(a) PREVENTS A WOMAN FROM OBTAINING AN ABORTION?

Answer: No.

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OPINIONS AND JUDGMENT BELOW

Respondent accepts the citations to the opinions and judgment of the lower courts as stated in the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The United States Supreme Court has discretion to exercise jurisdiction over this case pursuant to Rule 10.1 of the Rules of the Supreme Court of the United States and 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent accepts the verbatim recitation of constitutional provisions and statutes involved in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner Taneika James, is the mother and natural guardian of Louis Edmonds, a minor child. Petitioner has alleged that Taneika James was a patient of Wynne Cooper, M.D. for obstetrical care. They further allege that Dr. Cooper referred the patient for a sonogram which was performed and interpreted by Neal B. Simmons, M.D., Harvey L. Neiman, M.D. and Radiology Associates of Western Pennsylvania, C.P. at the Western Pennsylvania Hospital.

It is alleged that the sonogram revealed a defect in the brain of the fetus known as a porencephalic cyst. It is alleged that on October 25, 1988, the date of the sonogram, the fetus had a gestational age of 25.3 weeks with a range of 23.5 to 26.9 weeks.

The Petitioner further alleges that the results of the sonogram

were not communicated to the Petitioner by any of the Respondents/Defendants due to their collective and individual negligence. The Petitioner alleges that had she been promptly advised of the results of her sonogram, she would have aborted the child. Petitioner alleges that her son was born on February 12, 1989, and was diagnosed with quadrigeminal arachnoid cysts in addition to hydrocephalus. It is alleged that these conditions will require medical attention in the future.

The Petitioners filed two separate lawsuits in the Court of Common Pleas of Allegheny County alleging medical negligence and seeking damages for wrongful birth. The first suit was filed in 1989 against Wynne Cooper, M.D., the obstetrician of the mother, alleging negligence for failing to communicate the results of the sonogram performed on the mother. The second suit was brought by the same Petitioners against the Western Pennsylvania Hospital, Radiology Associates of Western Pennsylvania, P.C., Neal B. Simmons, M.D. and Harvey L. Neiman, M.D. again, alleging negligence and seeking damages for failing to communicate the results of the sonogram.

The Respondents/Defendants filed Preliminary Objections in the Nature of a Demurrer relying on 42 Pa. C.S.A. § 8305 which bars claims seeking recovery for wrongful birth. An order and opinion of the Honorable J. McLean sustained the Preliminary Objections. Dr. Cooper in the parallel suit filed a Notion for Judgment on the Pleadings raising the same defense and judgment was granted on her behalf and an opinion was entered by the Honorable David S. Cercone.

The Superior Court of Pennsylvania affirmed both orders and opinions by a published opinion dated April 30, 1992. *Edmonds v. Western Pennsylvania Hospital*, 414 Pa. Super. 567, 607 A.2d 1083 (1992). Both opinions found that the Pennsylvania statute did not constitute a deprivation or an interference with a woman's right to an abortion.

The Supreme Court of Pennsylvania denied *Allocator* on January 6, 1993.

SUMMARY OF ARGUMENT

The Supreme Court of Pennsylvania properly denied review of the Superior Court of Pennsylvania's opinion upholding the constitutionality of Pennsylvania's Wrongful Birth Statute, 42 Pa. C.S.A. § 8305.

The Petitioner asserts that review is proper based on the category of certiorari considerations contained in Rule 10.1(a) of the Rules of the Supreme Court of the United States. However, this matter does not present a decisional conflict among federal court of appeals as required by that rule. The Petitioner's attempt to obtain review by this Court based on alleged discrepancies between the Seventh and Eleventh Circuits fails. There is no conflict with either of these decisions and the decision below.

The Superior Court has rendered two subsequent opinions that the law in question is a valid legislative enactment and does not interfere with a woman's right to an abortion. These decisions recognize the Pennsylvania statute as constitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

This is an action alleging medical negligence against the Respondents/Defendants. Petitioner's claim that the Pennsylvania statute violates the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment is without merit. The Wrongful Birth Statute does not implicate "state action" which is a prerequisite to claiming a constitutional deprivation. However, assuming there is state action, then the Legislature of Pennsylvania had a rational basis for enacting the statute which does not unduly interfere with a woman' s ability to select an abortion.

For the reasons which follow, Respondents/Defendants request the Petition for Writ of Certiorari be denied.

REASONS FOR DENYING THE WRIT

I.

THERE EXISTS NO STATED CONFLICT BETWEEN THE DECISION BELOW AND THE SEVENTH AND ELEVENTH CIRCUIT DECISIONS CITED BY PETITIONER ON THE CONSTITUTIONALITY OF PENNSYLVANIA'S WRONGFUL BIRTH STATUTE.

Rule 10.1(a) of the Rules of the Supreme Court of the United States limits certiorari in "conflicting decision situations to those where a ". . . United States Court of Appeals has rendered a decision in conflict with the decision of *another* United States Court of Appeals on the same matter. . . ." (Emphasis added.)

In an attempt to secure certiorari order Rule 10.1(a), Petitioner asserts that a "conflict" exists between Seventh and Eleventh Circuit decisions. Petitioner specifically argues that *Robak v. United States of America*, 6587 F.2d 471 (7th Cir. 1981) and *Campbell v. United States*, 962 F.2d 1579 (11th Cir. 1992) *cert. denied*, 113 S. Ct. 1254 (Feb. 22, 1993) are "hard to reconcile" with each other (Petition for Writ of Certiorari, page 11).

Although Petitioner asserts that the Seventh Circuit's decision in *Robak* and the Eleventh Circuit's decision in *Campbell* are "hard to reconcile," she fails to point out any conflict between either of these decisions and the decision below. Rule 10.1(a) addresses conflicts among court of appeals decisions. However, the decision below is from the highest state court of Pennsylvania.

If review is proper at all, it could only be premised under a

Rule 10.1(b) or (c) conflict. Here the Petitioner has not pointed out any inconsistency between a court of appeals decision and the decision below. Rather, the Petitioner asks this court to find a conflict to exist based on alleged discrepancies between two circuit decisions without regard to the decision below.

Assuming, *arguendo,* the Petitioner had relied on a Rule 10.1(b) conflict between a decision rendered by the highest state court and a court of appeals, certiorari should still be denied. The decision below is consistent with the Eleventh Circuit's findings in *Campbell.* The court of appeals decided that refusal to allow a cause of action for wrongful birth did not amount to state action and was not in violation of The Due Process or Equal Protection Clauses under the Fourteenth Amendment. The Supreme Court of the United States refused to take that case upon Petition for Writ of Certiorari.

Equally, the decision below is not inconsistent with *Robak.* The Seventh Circuit held that under Alabama law there existed a cause of action for wrongful birth. That court did *not* have the opportunity to address the constitutionality of a statute barring a cause of action for wrongful birth. The Seventh Circuit simply decided that such a cause of action existed under Alabama law while the decision below dealt with the constitutionality of a state statute barring a cause of action for wrongful birth.[1] Therefore, *Robak* and the decision below are not in conflict.

Assuming, *arguendo,* the Petitioner had relied on Rule 10.1(c) of the Rules of the United States Supreme Court, which provides for certiorari consideration, "When a state court . . . has decided an

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1. In Pennsylvania, after the decision in *Speck v. Finegold,* 497 Pa. 77, 439 A.2d 110 (1981), the legislature by statute barred such causes of action for wrongful birth. *(See also,* Opinion of Cercone, J. (Petitioner's Brief, Appendix E p. 24a.)) In *Robak,* there was no legislative enactment.

important question of federal law which has not been, but should be settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court," the Petition should still be denied. As discussed extensively by Respondent in subsection (c) of this Brief, Petitioner's claim is not about a woman's constitutionally protected right to an abortion. This case is a negligence claim seeking damages for alleged medical malpractice. The Petitioner attempts to hold the Respondents/ Defendants responsible for genetic problems they did not cause. The Pennsylvania Legislature has rationally chosen to bar such causes of action. Therefore, the Petition does not involve a constitutional question for this Court to review.

The Petitioner has not asserted a proper "conflict" between circuit decisions under Rule 10.1(a), because the decision rendered below is one from the highest state court. Moreover, the Petitioner has not identified any conflict in the decision rendered below and ". . . the decision . . . of a United States Court of Appeals." Rule 10.1(b), Rules of the Supreme Court of the United States. The Petitioner has presented no important question of constitutional law or decision that conflicts with those of the United States Supreme Court under Rule 10.1(c). Accordingly, the Petition for Writ of Certiorari should be denied.

II.

DECISION BELOW WAS FOLLOWED BY TWO SUBSEQUENT PENNSYLVANIA SUPERIOR COURT DECISIONS.

The Superior Court of Pennsylvania followed the decision below *(Edmonds v. Western Pennsylvania Hospital,* 414 Pa. Super. 567, 607 A.2d 1083 (1992)) on two subsequent occasions.

In *Dansby v. Thomas Jefferson University Hospital,* 1993 WL

78740 (Pa. Super. 1993), the court citing *Edmonds* as a "similar constitutional challenge" stated that the wrongful birth statute did not burden a woman's right to an abortion or exercise of that right. *Id.* at 2-3.

The Superior Court in *Bianchini v. N.K.D.S. Associates Ltd.*, 616 A.2d 700 (Pa. Super. 1992) held that *Edmonds* controlled the constitutional challenge to Pennsylvania's wrongful birth statute. *Id.* at 703, n.7.

III.

PENNSYLVANIA'S WRONGFUL BIRTH STATUTE IS CONSTITUTIONAL UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION.

The Petitioners contend that the legislative enactment barring claims for wrongful birth violates the Constitution of the United States because it interferes with a woman's right to an abortion.

The Superior Court of Pennsylvania, Judges McLean and Cercone and the Respondents all assert that the law in question is a valid legislative enactment and does not interfere with a woman's right to an abortion. The Supreme Court of Pennsylvania denied *Allocatur.*

The Superior Court of Pennsylvania correctly noted that legislative enactments enjoy a strong presumption of constitutionality. *Dranzo v. Winterhalter,* 395 Pa. Super. 578, 577 A.2d 1349 (1990). In addition, all doubts relating to the constitutionality of legislative enactments must be resolved in the law's favor. *Dansby,* 1993 WL 78740 (Pa. Super.) at 1, *citing Edmonds,* 414 Pa. Super. at 574, 607 A.2d at 1087.

The Petitioners have alleged that the Due Process and Equal Protection Clauses of the Fourteenth Amendment have been violated by the Pennsylvania statute. A prerequisite for finding a violation of the Fourteenth Amendment is a showing by the moving party that there is state action. *Shelley v. Kramer,* 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948). In this case, only private conduct is at issue. The hospital, the doctors and the professional group are all independent private actors not operating under the color of state law.

The Supreme Court of Minnesota in an extremely similar case found that a Minnesota law barring claims for wrongful birth did not involve state action. The Minnesota Supreme Court held:

> The relationship here is strictly between doctor and patient. The statute does not forbid the doctor to inform the patient of new tests and the risks they entail. It does not directly touch on the expectant mother's right to choose an abortion. Due process does not require that the state adopt regulations prohibiting purely private conduct.

Hickman v. Group Health Plan, Inc., 396 N.W. 2d 10, 13 (1986), *citing Bloom v. Yaretsky,* 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982).

Pennsylvania's wrongful birth statute does not interfere with the right of the Petitioner to choose an abortion. The law in question prevents a claim for damages and suit against the doctor for damages. The law does not regulate, interfere with, or otherwise dictate when a doctor or patient may discuss abortion as an option or when a mother may choose abortion as an option.

The decision of *Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L.

Ed. 2d 147 (1973) created a right for a woman to choose an abortion under certain circumstances. However, *Roe* did not declare an unqualified constitutional right to an abortion. Rather, a woman may select an abortion without unduly burdensome interference by the state. *Maher v. Roe*, 432 U.S. 464, 97 S. Ct. 2376, 2382, 53 L. Ed. 2d 484 (1977). The Supreme Court has repeatedly held that a state may make value judgments favoring childbirth over abortion. *Rust v. Sullivan*, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). Furthermore, *Roe v. Wade* "implies no limitation on the authority of the state to make value judgments favoring childbirth over abortion." *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989). Here, there is no interference by the state with a doctor and patient to discuss an abortion. The court of appeals in *Campbell* stated:

> Georgia has not commanded doctors to interfere with a woman's constitutional rights. Georgia's reluctance to interject itself into the private relations of its citizens cannot be construed as affirming or encouraging private conduct for purposes of the Fourteenth Amendment. To find state action whenever a state has not acted would broaden state action to encompass practically all private conduct.

Campbell, 962 F.2d at 1583. Pennsylvania's law is markedly different from the holding of the United States Supreme Court in *Rust* where the court upheld regulations which prohibited a doctor from discussing abortions with patients at federally funded clinics. Here, the law in no way prevents or prohibits a doctor from discussing abortions with a patient.

The United States Supreme Court has also held that there must be a direct impact on a woman's abortion right or a significant burden placed on an abortion right before the law in question will

be held invalid. *See Maher,* 97 S. Ct. 2376 and *Planned Parenthood Association v. Ashcroft,* 462 U.S. 476, 103 S. Ct. 2517, 76 L. Ed. 2d 733 (1983). In other words, a government may not place obstacles in the path of a woman's exercise of her freedom of choice, but by the same token, government need not remove those obstacles which are not of its own creation. *Hickman,* 396 N.W. 2d at 17, citing *Harris v. McRae,* 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980). As the Pennsylvania Superior Court recently noted in *Dansby,* quoting *Speck:*

> The "refusal to create new tort liability does not constitute governmental interference with the constitutionally protected access to abortion. The right to seek an abortion is neither predicated upon the existence of a negligence cause of action, nor is it deterred by the absence of such a cause of action."

Speck, 497 Pa. at 97, 439 A.2d at 120-121 (Opinion by Nix, J.) *cited* in *Dansby,* 1993 WL 78740 (Pa. Super.) at 3.

Here there is no state action, and the law in question does not interfere with or unduly burden a woman s right to an abortion. The law in question prevents a claim for damages in a suit against a doctor for damages. The law does not regulate, interfere with or otherwise dictate when a doctor and a patient may decide about abortion as an option. Therefore, there is no infringement of the rights announced in *Roe v. Wade.*

However, assuming there is state action, then the Legislature of Pennsylvania had a rational basis for enacting the Wrongful Birth Statute. Pennsylvania is permitted to make a value judgment favoring childbirth over abortion. *Rust,* 111 S. Ct. at 1772. The Supreme Court of the United States has held that there is no need for a state to show a compelling state interest each time it makes a

value judgment favoring childbirth over abortion. *Maher,* 97 S. Ct. at 2384. The Supreme Court in *Maher* held specifically:

> We think it is abundantly clear that a state is not required to show a *compelling interest* for its policy choice to favor normal childbirth anymore than a state must so justify its election to fund public but not private education.

Id. (emphasis added). The Supreme Court held that the rational basis test applied because the law in question did not impinge on the right to select an abortion. *Id.* at 2385, *citing Lindsey v. Normet,* 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976). Here there is no impingement on the petitioner-mother's right to select an abortion. Therefore, the law need only have a rational basis.

Perhaps the most succinct and eloquent defense of the law regarding its rational basis is set forth in Judge Cercone's Opinion. The Judge wrote as follows:

> We believe that our legislature unquestionably had a rational basis for enacting section 8305. Senator Rocks provided the following viewpoint during debate on this legislation:
>
> > This is the intent of what the wrongful birth and wrongful life legislation is about[:] To stop a court and gender policy which views the birth of a child, be that child handicapped or otherwise, as a damaging event for which someone should be punished in order to prevent this quality of life ethic from becoming

> so pervasive that a handicapped child is routinely considered better off dead and of less value than what we would call a "normal child" and to prevent the practice of medicine especially obstetrics and gynecology, from becoming coerced into accepting eugenic abortion as a condition for avoiding what are particularly wrongful birth lawsuits.
>
> Pa. Senate Leg. 1961 (March 22, 1988).

Other proffered rational for this statute are also persuasive. The legislature believed that it would be improper to view any birth as an evil or wrong, and thus a cause of action. Secondly, our society has become increasingly aware and protective of the rights of the handicapped. To recognize the validity of a wrongful life statute would be to make the handicapped a lower class of citizen. Third, the recognition of these types of actions by the legislature would, in essence, have dictated to the medical profession how to practice in the area of obstetrics. Finally, a recognition of these causes of action would have caused ever increasing malpractice insurance rates to increase exponentially, where the resulting loss of adequate medical care in this vital area. *See* Pa. House Leg. 2306 (February 24, 1988).

We believe that Section 8305 has a rational basis designed to meet a legitimate state interest. The legislature has not opted to make

> physicians exempt for their wrongdoings. Rather the legislature has validly freed physicians from liability from defects or handicaps for which the physician is in no way responsible.

(Petitioner's Brief, Appendix E, p. 26a).

As was noted previously, at the core of a wrongful birth cause of action is the idea that persons born disabled have suffered a legal injustice in that non-existence is preferable to an existence with disabilities. "The idea that a handicapped child would lead a life that should better never have been lived, or that the parents are damaged by that child's presence in their family, bespeaks . . . a pervasive social prejudice against a handicap . . ." *Valentine, When the Life Calls Life Wrong,* 8 Hum. Life Rev. 46, 52 (Summer 1982). If we assume that a wrongful birth cause of action is based upon an irrational prejudice against disabled persons, then that cause of action in itself would be unconstitutional. *Bopp, Bostrom & McKinney, The Rights and Wrongs of Wrongful Birth and Wrongful Life: A Juris Prudential Analysis of Birth Related Torts,* 27 Duq. L. Rev. 461 (Spring, 1989), *citing City of Cleburne, Texas v. Cleburne Living Center, Inc.,* 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (The court struck down a restrictive zoning ordinance based on an irrational prejudice against the mentally retarded). Allowing a cause of action for wrongful birth also contradicts many state policies designed to provide assistance to disabled persons. The contradiction arises where a state permits a wrongful birth claim that in essence encourages the destruction of disabled fetuses while at the same time the state seeks to protect those lives after birth. *Rosenblum & Grant, The Legal Response to Baby Doe: An Analytical Prognosis,* 1 Issues in L. & Med. 391 (1986).

If wrongful birth causes of action are permitted in Pennsylvania, this will also place an increasing burden on

physicians to determine what information is important to parents when attempting to obtain the parent s consent for the fetus to be carried to term. *Azzolino v. Dingfelder,* 315 N.C. 103, 337 S.E. 2d 528 (1985). As medical science advances, increasing physicians' capabilities of detecting genetic imperfections, then this increased knowledge will inevitably place physicians in a dilemma of whether or not to take the safe course of action which would be to recommend an abortion. *Id.*

As part of Petitioner's equal protection claim, they argue that Pennsylvania permits a cause of action for wrongful conception based upon negligence in connection with a failed sterilization, but denies a cause of action based upon negligence which interferes with the woman's right to an abortion. Presently, Pennsylvania permits a cause of action for wrongful conception. *Speck v. Finegold,* 497 Pa. 77, 439 A.2d 110 (1981). In enacting 42 Pa. C.S.A. § 8305, the legislature of Pennsylvania did not intend to extinguish a cause of action for wrongful conception. In response to a statement by Senator Lewis during debate on the wrongful birth legislation, Senator Rocks stated:

> For what the gentleman from Bucks, Senator Lewis, has called his second level of concern, the physician described with the so-called botched or fully negligent sterilization, nothing in this legislation would prevent an action fully calling into account the negligence of that physician. In fact, the suit would be on the grounds of wrongful conception. It could be brought today and should be brought tomorrow. Nothing in the legislation in front of us deals with that. In that hypothetical situation, while I would hope it would not happen, the physician would be fully liable to the fullest extent of the court's decision for

> both his or her negligence and the financial damages involved.

19 Leg. Journal P. 1963 (March 22, 1988).

Allowing a cause of action for wrongful conception and disallowing one for wrongful birth, does not violate the Equal Protection clause. In *Dansby,* the Superior Court of Pennsylvania held that Pennsylvania's Wrongful Birth Statute had a rational basis. The Court stated that with an equal protection claim, "When the group affected is not a suspect class and the right infringed is not deemed fundamental, the challenged statute must be sustained if it bears a rational relationship to a legitimate state interest." *Dansby,* 1993 W.L. 78749 at 3. The Minnesota Supreme Court in *Hickman,* pointed out that the differences between wrongful conception causes of action and wrongful birth causes of action establish a rational basis for the legislature's action:

> In both cases, the Plaintiff would not have had the child, but for the negligence of the doctor, but the interest sought to be compensated are different. In one case, there is the right not to conceive; and the other, there is the right not to give birth. In the one, it is the right not to have an unplanned child, while in the other, it is the right not to have an unwanted child. In the one case, there is no hypothetical exercise of choice of treatment, while in the other case there is.

Hickman, 396 N.W. 2d at 17 (concurring Opinion of Justice Simonett).

The Pennsylvania Legislature had several rational bases for enacting a Wrongful Birth Statute. The United States Supreme Court has held that a state may make value judgments which favor

childbirth over abortion, so long as that judgment is not made at the expense of a woman's right to an abortion. Pennsylvania's Wrongful Birth Statute does not infringe upon a woman's right to an abortion. As Judge Cercone noted, the refusal to recognize a cause of action for wrongful birth does not interfere with the constitutionality protected right to choose an abortion (Petitioner's Brief, Appendix E, p. 26a).

IV.

REVIEW OF THE DECISION BELOW WOULD TURN SOLELY UPON AN ANALYSIS OF A STATE TORT LAW CLAIM.

Plaintiffs who allege a wrongful birth cause of action, must meet the traditional requirements of a negligence actions, which include the existence of a duty, a breach of that duty, and a showing that the breach was the proximate cause of the Plaintiffs' injuries and damages. If we assume that doctor owes a duty to a patient to conduct genetic tests and to apprise the patient of those results and that this duty has been breached, the requirement of showing that the breach was the proximate cause of the Plaintiff's injury would require a quantum leap. A patient in a position such as Taneika James, must admit that her fetus, which was in existence at the time of the alleged breach of duty was not the result of any breach of duty. *Azzolino,* 337 S.E. 2d at 553. As the court in *Dansby* noted:

> The legislature, by statute, has freed physicians from liability for birth defects or handicaps for which the physician was not responsible. The physician's alleged negligence in failing to perform carefully an amniocentesis test cannot be said to be the proximate cause of the child's handicapped wife. In this case, the child's disorders existed from the time of conception

> and were not the result of any negligence on the part of Mrs. Dansby's positions.

Dansby, 1993 W.L. 78749 at 3. Taking this a step further, even if we assume that the birth of a disabled child was the proximate result of the Defendant's negligence, traditional tort analysis breaks down, because in order to permit a recovery, a court must hold that the existence of human life constitutes an injury. *Azzolino,* 337 S.E. 2d at 533-34.

Under traditional tort law, it is a fundamental principle for damages to restore an injured party at near as possible to the position he or she occupied prior to the commission of a wrong by another party. *Bopp Bostrom & McKinney, The Rights and Wrongs and Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts,* 19 Duq. L. Rev. 461, 503 (Spring, 1989) citing *United States v. Hatahley,* 257 F.2d 920 (10th Cir. 1958) (other citations omitted). Therefore, in theory, a parent who brings a wrongful birth cause of action seeks to recover for the birth of a living child which could have been avoided by an abortion. *Id.* at 503-504. Under this situation, the most effective and inexpensive remedy would be to end the child's life. *Id.* Obviously, this is not a viable remedy, but it points out why wrongfully birth causes of action do not fit within traditional concepts of tort recovery. There is also a problem with mitigation of damages under a wrongful birth cause of action. Traditional tort concepts require a plaintiff to mitigate damages. *Azzolino,* 337 S.E. 2d at 534. Justice Mitchell writing for the Supreme Court of North Carolina discussed one of the problems confronting courts concerning the extent to which a Plaintiff must mitigate damages:

> They have for example, been unable to reach anything resembling a consensus as to whether damages in wrongful birth cases should be reduced or offset by any emotional or other

> benefits accruing to the parent by reason of the life, live and affection of the defective child. (Citation omitted.) Likewise, they have been unable to reach any consensus on the issue of whether there is a duty on the part of the parents to place the child for adoption in order to reduce their damages...
>
> Perhaps the uncertainty and lack of uniformity among courts concerning both the proper measure of damages and the duty to mitigate damages in wrongful birth cases, arises at least in part from a failure to recognize that the "injury" for which they seek to compensate the Plaintiffs is the existence of a human life. As a result: Although courts and commentators have attempted to make it such, wrongful birth is not an ordinary tort. It is one thing to compensate destruction; it is quite another to compensate creation. This so-called wrong is unique. It is a new and ongoing condition. As life, it necessarily interacts with other lives. Indeed, it drives its injurious nature from the predilection of the other lives it touches. It is naive to suggest that such a situation falls neatly into conventional tort principles, producing neatly calculable damages. (Citation omitted).

Azzolino, 537 S.E. 2d at 534-535.

From the foregoing discussion, it is easy to see why the legislature has banned the cause of action for wrongful birth.

The Superior Court of Pennsylvania in an excellent analysis found that the language of the law did not compel the conclusion

that the law encouraged medical providers to infringe upon the abortion rights of their patients. The Court stated:

> If a physician intentionally misrepresented to a woman the state of her health or that of her fetus in an effort to infringe upon her abortion rights, he could be disciplined by the appropriate licensing authority. Since 42 Pa. C.S.A. § 8305(a) specifically indicates that it provides no defense to a disciplinary proceeding involving such misrepresentations, it clearly does not encourage physicians to make them.

Edmonds, 607 A.2d at 1087 (Petitioner's Brief, Appendix D, p. 15a). A physician who did that would be subject to certain disciplinary review procedures found in the Osteopathic Medical Practices Act and Medical Practice Act. 63 P.S. § 27.1, *et seq.* and 63 P.S. § 422.1, *et seq.* Similarly, the Eleventh Circuit in *Campbell* stated, "A doctor who negligently failed to provide this information to a pregnant woman runs the risk of having Georgia's Board of Medical Examiners determine that the doctor s deficient performance merits suspension or revocation of the doctor's medical license." *Campbell*, 962 F.2d at 1586-1587. Moreover, the law is silent as to whether it encourages a physician to engage in negligent conduct. Therefore, the Superior Court of Pennsylvania felt that the presumption of constitutional legitimacy would prevent it from finding a law to be unconstitutional. *Edmonds*, 607 A.2d at 1088 (Petitioner's Brief, Appendix D, p. 16a). Perhaps most compelling is the unrefuted fact that the law does not prevent or interfere with the woman's right to an abortion.

CONCLUSION

For the foregoing reasons, Respondent, Western Pennsylvania Hospital, respectfully requests that the Petition for Writ of Certiorari be denied because the criteria contained in Rule 10.1 of the Rules of the United States Supreme Court are not met. Additionally, the law in question does not constitute state action, does not interfere with or burden a woman's right to select an abortion, is a valid rationale exercise of the legislative function and does not violate the Constitution of the United States.

Respectfully submitted,

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